BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION BELOW.

The opinion in the Circuit Court of Appeals for the Eighth Circuit (R. 212-226) was filed November 17, 1941, and is reported in 123 F. (2d) 364.

The petition for rehearing (R. 228-236) was filed by the petitioner on December 2, 1941, and was by the Court overruled on December 5, 1941 (R. 237).

An order was issued by the Circuit Court of Appeals on December 15, 1941, staying the issuance of the mandate for a period of sixty days from and after said date, pending the filing of a petition to the Supreme Court of the United States for a writ of certiorari (R. 239).

II.

JURISDICTION.

1. The judgment of the Circuit Court of Appeals for the Eighth Circuit to be reviewed was rendered on November 17, 1941 (R. 227), and the petition for rehearing filed by the petitioner in that Court was overruled on December 5, 1941 (R. 237).

2. The statutory provisions which are believed to sustain the jurisdiction of this Court are:

> Judicial Code, Section 240 (a), as amended by the Act of February 13, 1925, 28 U. S. C. A., Section 347 (a), 28 U. S. C. A., Section 350.

3. The facts and rulings involved herein which are believed to bring this case within the jurisdiction relied upon and our reasons for the allowance of the writ are as follows:

a. The decision of the Circuit Court of Appeals in holding that the plan submitted by the Bondholders' Committee for the disposition of the assets owned by the depositing bondholders is fair and equitable is directly contrary to and in conflict with the following applicable decisions of the Supreme Court of the United States:

Northern Pacific Railway Company v. Boyd, 228 U. S. 482;
Kansas City Terminal Ry. Co. v. Central Trust Company, 271 U. S. 445;
Case v. Los Angeles Lumber Products Company, 308 U. S. 106;
Consolidated Rock Products Company v. Du Bois, 312 U. S. 512.

b. The decision of the Circuit Court of Appeals in holding that the approval by the District Court of the plan submitted by the Bondholders' Committee and its disapproval of the plan submitted by the petitioner presented "a question of business policy calling for the exercise of business judgment" and was within the discretionary power of the District Court is in conflict with the following decisions of the Supreme Court of the United States:

National Surety Company v. Coriell, 289 U. S. 426;
First National Bank v. Flershem, 290 U. S. 504;
Case v. Los Angeles Lumber Products Company, 308 U. S. 106;
Consolidated Rock Products Company v. Du Bois, 312 U. S. 510.

c. The decision of the Circuit Court of Appeals in holding that the dual position occupied by Thomas N. Dysart, chairman of the Bondholders' Committee and chief sponsor of the plan and his conflicting loyalties may be disregarded as not being material considerations in the determination of the fairness and equity of the plan, is in con-

flict with the following applicable decisions of the Supreme Court of the United States:

American United Mutual Life Insurance Company v. City of Avon Park, 311 U. S. 138;
Woods v. City National Bank and Trust Company, 312 U. S. 262.

III.

STATEMENT OF THE CASE.

The preceding petition under Subdivision I contains a "summary statement of matter involved" and the same is hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in holding that the plan of the Bondholders' Committee was fair and equitable (R. 221).

2. The Circuit Court of Appeals erred in holding that the District Court, in approving the plan of the Bondholders' Committee and rejecting the plan of Scherck, Richter & Company, was determining a question of business policy calling for the exercise of business judgment (R. 221).

3. The Circuit Court of Appeals erred in holding that in reviewing the judgment of the District Court approving the plan it could leave out of consideration the fact that Thomas N. Dysart, who was Chairman of the Bondholders' Committee and President and voting trustee of the corporation, occupied a dual and antagonistic position of conflicting loyalties (R. 221).

V.

ARGUMENT.

A.

The plan of the Bondholders' Committee was unfair and inequitable because under it valuable rights and interests in assets owned exclusively by the holders of the certificates of deposit are gratuitously given to persons and interests who have no rights in or claim to these assets.

The plan of the Bondholders' Committee takes away from the holders of certificates of deposit the shares of stock representing a 52 per cent interest in the St. Louis Amusement Company and transfers them to the proposed new corporation, Ambassador Investment Corporation, and the holders of certificates of deposit are then given a $12.00 nonincome liquidating preferred stock in the new corporation which has no voting rights. The common stock is given to the Ambassador Building Corporation without any consideration paid therefor by it. In fact, the Ambassador Building Corporation is receiving from the Bondholders' Committee mortgages having a conceded per cash value of $92,000.00, for which it pays the Committee $57,000.00, thus realizing at the expense of the certificate holders a profit of $34,000.00 (R. 90). The plan and the proposed Articles of Incorporation under the new company show conclusively that the only assets which are to be contributed to the new corporation for all of the stock, preferred and common, are these same shares representing the 52 per cent interest in the St. Louis Amusement Company (R. 31-34).

But these assets belong absolutely and exclusively to the holders of the certificates of deposit (R. 123). They have more than a lien or first claim on the assets; they are the absolute and exclusive owners. There are no subordinate rights in or claims to these assets such as we often have

in reorganizations, which can possibly call for any recognition whatever.

The Ambassador Building Corporation, which will receive the common stock in the new corporation, cannot be identified with the holders of the certificates of deposit because it is undisputed that 30 per cent of the new income bonds in that corporation is held by persons who have bought the bonds since the original plan was consummated and who admittedly have no claims whatever to the 52 per cent interest in the St. Louis Amusement Company (R. 133). These new bondholders, like the old bondholders, have voting trust certificates for the stock of the corporation which passed with the bonds. Of the stock authorized and issued under the original plan of reorganization 25 per cent was allotted to second mortgage bondholders and 10 per cent for the management of the corporation, and this 35 per cent of the stock issued also represented by voting trust certificates has not the slightest interest in the stock of the St. Louis Amusement Company.

The plan will therefore result in the following advantages to persons who have no claim which can be recognized in the disposal of these valuable assets owned by the holders of the certificates of deposit.

1. The control of the St. Louis Amusement Company will pass to the voting trustees of the Ambassador Building Corporation who, under the voting trust agreement, function until 1953.

2. Holders of income bonds of the Ambassador Building Corporation in an amount of approximately $1,000,000, representing 30 per cent of the outstanding bond issue, will participate equally and ratably with the holders of 70 per cent of the outstanding bonds, who are holders of certificates of deposit, in all the benefits and advantages de-

rived from the ownership of the common stock in the Ambassador Investment Corporation.

3. Subject only to the superior rights of the income bondholders the holders of voting trust certificates for 35 per cent of the stock of the Ambassador Building Corporation allotted to the second mortgage bondholders and to management will participate in the benefits and advantages derived from the ownership of the common stock in the Ambassador Investment Corporation.

As against these advantages gratuitously given to interests which have no claim, the holders of certificates of deposit are being deprived of the direct and unqualified ownership of the 52 per cent interest in the St. Louis Amusement Company and are reeciving therefor, under the plan, a $12.00 non-income liquidating preferred stock and a diluted, remote and indirect participation in the common stock of the Ambassador Investment Corporation, which is to own and control the St. Louis Amusement Company stock. This latter participation, however, is only to be given to those holders of certificates of deposit who are still the owners of the income bonds of the Ambassador Building Corporation. The holders of certificates of deposit who have sold the income bonds of the reorganized company will receive for their pro rata and unqualified ownership of the St. Louis Amusement Company stock only the liquidating non-income preferred stock of the Ambassador Investment Corporation.

The Circuit Court of Appeals in its opinion (R. 223) recognizes that the holders of the certificates of deposit are entitled as against the other interests above mentioned to the full participation exclusively in the assets dealt with in the plan. The Court, however, refuses to strike down the plan and suggests several matters which the Court believes saves the plan (R. 220). Thus the Court says:

"The arrangement for issuing common stock appears to be for the purpose of simplicity of control and management rather than with the idea of any financial advantage to accrue at least for several years. Such control, if exercised for the benefit of certificate holders, would also be for the benefit of bondholders and other interests. Their relations are similar and their interests mutual."

The difficulty with the foregoing suggestion of the Court is that the bondholders, who are not certificate holders, and the other interests referred to have no legal or moral claim to any such benefits. Then, too, there is no doubt that the common stock in the new corporation presents a definite financial advantage. When the Court says that it will not accrue for a period of several years, presumably it has in mind that it will take a number of years to liquidate the interests of the preferred stockholders. The best answer to this observation of the Court is the fact that, in the alternative plan proposed by the petitioner, the petitioner and Fanchon & Marco Enterprises, Inc., in consideration for this common stock offered to put in $300,000.00 in new capital, including $100,000.00 cash and the 42 per cent interest in the St. Louis Amusement Company, for which they would take a preferred stock subordinate to a $15.00 preferred stock carrying prior dividend rights at the rate of 5 per cent per annum and a complete priority on liquidation.

The Court of Appeals considered, as an argument for fairness of the plan (R. 220), that the Ambassador Building Corporation offered to pay the certificate holders who had sold their bonds $8.00 per share of the new preferred stock. We do not see how that offer affects the fairness of the plan. The Court in its opinion (R. 217) draws a stronger conclusion from the statement made by counsel for petitioner at the hearing in the District Court than we submit should be drawn. Counsel stated, "We are

not making any complaint of the adequacy or inadequacy of the $8.00; we make no point of that." We do not believe that that is a concession that $8.00 was a fair price. However, we cannot see that this consideration is material to the fairness of the plan. The right of a security holder to challenge the fairness of the plan ought not to depend on whether he has the privilege of selling his securities at a price fixed by the proponent of the plan.

With all deference to the Court of Appeals, we submit that the foregoing considerations suggested by the Court deal with collateral and perhaps imponderable matters which are analogous to those rejected by this Court in **Case v. Los Angeles Lumber Products Company,** 308 U. S. 106, 122, 123.

The approval of the plan by the Courts below represents a complete departure from the absolute priority rule laid down by this Court in the following cases:

Northern Pacific Railway Company v. Boyd, 228 U. S. 482;

Kansas City Terminal Railway Company v. Central Union Trust Company, 271 U. S. 445;

Case v. Los Angeles Lumber Products Company, 308 U. S. 106;

Consolidated Rock Products Company v. Du Bois, 312 U. S. 510.

B.

The approval by the District Court of the plan of the Bondholders' Committee and the rejection of the Scherck, Richter plan was not a determination by the Court of a question of business policy. It was the determination by the Court of a matter that called for its informed and independent judgment which affected the property rights of all the security holders.

The Court of Appeals in its opinion (R. 221) concluded that "the question presented to the lower court was un-

der the circumstances disclosed by this record, a question of business policy calling for the exercise of business judgment. Its decision should not be disturbed in the absence of an abuse of discretion." The Court has not pointed out wherein the plan involves any question of business policy. We assume that the Court had in mind administrative orders which are made in the course of receivership cases and which do not affect individual property rights. In the case at hand the judgment was made by the Court on matters which definitely affected the property rights of the certificate holders. The plan takes away beneficial property rights from the certificate holders and gives benefits and advantages to persons and interests who have no claim entitled to recognition. The numerous certificate holders were not requested to give their affirmative vote or assent to the plan such as is required in proceedings under the Chandler Act. In lieu of that they were given the opportunity to make their objections to the plan at a hearing. The only certificate holders who appeared at the hearing were objecting certificate holders, including the petitioner and Julia A. Healy. The District Judge, under the principles laid down by this Court, was virtually the guardian of the numerous certificate holders whose rights were affected by the Court's judgment on the plan submitted. This was particularly true in the instant case, because of the anomalous position occupied by the Chairman of the Bondholders' Committee. In this situation the guiding principles laid down by this Court are particularly applicable.

> **First National Bank v. Flershem**, 290 U. S. 504;
> **National Surety Company v. Coriell**, 289 U. S. 426;
> **Case v. Los Angeles Lumber Products Company**, 308 U. S. 106.

The Court was not only required to scrutinize the plan of the Bondholders' Committee for any inequities or dis-

advantages, but was also required to give careful consideration to the Scherck, Richter plan in order to determine whether that plan was more beneficial and advantageous to the holders of certificates of deposit. The advantages to the certificate holders of the Scherck, Richter plan are apparent (R. 64-68, 104-111):

1. Under the Scherck, Richter plan all of the holders of certificates of deposit are treated on the same basis and no gratuity is given to persons and interest who have no claims.

2. As compared with a $12.00 nonincome liquidating preferred stock given under the plan of the Bondholders' Committee, the holders of certificates of deposit, under the Scherck, Richter plan, received a $15.00 prior preferred stock entitled to dividends of 5 per cent.

3. The prior preferred stock given to the holders of certificates of deposit is cushioned not only by the 52 per cent interest in the St. Louis Amusement Company received from the certificate holders, but also by the 42 per cent interest in that company contributed by Fanchon and Marco, and $100,000.00 in cash contributed by Scherck, Richter Company for the second preferred stock and the common stock.

The approval by the District Court of a plan which contains the inequities to which we have referred and its rejection of a plan which is manifestly more advantageous to the holders of certificates of deposit, do not, we submit, measure up to the scrutiny and independent judgment required of the Court under the principles announced by this Court in the foregoing cases.

C.

The dual position occupied by Thomas N. Dysart, Chairman of the Bondholders' Committee, required special scrutiny of the plan.

Mr. Thomas N. Dysart, Chairman of the Bondholders' Committee, was the chief protagonist of the plan submitted (R. 122-123). The plan was embodied in the contract entered into by the Bondholders' Committee, of which he is Chairman, and the Ambassador Building Corporation, of which he is President and a voting trustee (R. 123). The only other active member of the Committee is Frederick W. Straus, who lives in Chicago, and who is a member of the original underwriting house of S. W. Straus & Sons, which sold the securities. Mr. Dysart testified that in negotiating the contract embodying the plan he was really looking out for the interests of the holders of the certificates of deposit, particularly the 30 per cent interest who had sold their new bonds in the company, and not the holders of certificates of deposit who still retained the new bonds in the company (R. 128).

We may accept the avowals and disavowals of Mr. Dysart with reference to negotiations of this contract as has been given in full sincerity. His testimony, however, reveals the fact that he did not have his eye singly to the holders of the certificates of deposit and particularly such holders as had sold their new bonds in the reorganized company. He believed that the full discharge of his duties was accomplished in his embodying in the plan an offer by the Ambassador Building Corporation to pay $8.00 per unit to such certificate holders who had sold their bonds (R. 128). His main consideration was for the Ambassador Building Corporation and the new bondholders (R. 126).

By reason of the conflict of interest here involved and the dual position occupied by him, Mr. Dysart did not qualify to represent the certificate holders in the formula-

tion and negotiation of the plan of reorganization in which the corporation of which he was President and voting trustee was receiving benefits and advantages.

In **American Mutual Life Insurance Company v. City of Avon Park, Fla.**, 311 U. S. 138, 146, this Court said:

> "As we said in Case v. Los Angeles Lumber Products Company, 308 U. S. 106, 114, 60 S. Ct. 1, 6, 84 L. Ed. 110, 'The court is not merely a ministerial register of the vote of the several classes of security holders.' The responsibility of the court entails scrutiny of the circumstances surrounding the acceptances, the special or ulterior motives which may have induced them, the time of acquiring the claims so voting, the amount paid therefor, and the like. See Continental Insurance Co. v. Louisiana Oil Refining Corp. (5 Cir.), 89 F. (2d) 333. Only after such investigation can the court exercise the 'informed independent judgment' (National Surety Co. v. Coriell, 289 U. S. 426, 436; Case v. Los Angeles Lumber Products Co., supra, 308 U. S., page 115), which is an essential prerequisite for confirmation of a plan."

In **Woods v. City National Bank & Trust Company**, 312 U. S. 262, 269, the observations of this Court, although in another connection, are pertinent.

> "A fiduciary who represents security holders in a reorganization may not perfect his claim to compensation by insisting that although he had conflicting interests, he served his several masters equally well or that his primary loyalty was not weakened by the pull of his secondary one. Only strict adherence to these equitable principles can keep the standard of conduct for fiduciaries 'at a level higher than that trodden by the crowd.' See Mr. Justice Cardozo in Meinhard v. Salmon, 249 N. Y. 458, 464, 164 N. E. 545, 546, 62 A. L. R. 1."

The plan presented by the Bondholders' Committee as embodied in this contract with the Ambassador Building Corporation was submitted to the Court as having resulted from real negotiations between adverse interests and undoubtedly was weighted with that consideration. That situation, however, was entirely on the surface. It did not represent the core of the reality.

The petitioner, therefore, respectfully submits that the Court, in the exercise of its supervisory power, grant to the petitioners a writ of certiorari and thereafter review and reverse the decision of the lower court.

Respectfully submitted,

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